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No. 88-2040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GALEN NELSON - - - - - - - - Petitioner

versus

JEFFERSON COUNTY, KENTUCKY, ADDISON MITCHELL McCONNELL, EDGAR G. HELM, JR., KENNETH GRAHAM, CHARLES TOPP, DAVID WHALIN, KENNETH LAMPE and JAMES FUCHS - - - - - - Respondents

On Writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the Petitioner advanced any special or important reason warranting review of this case?

The Respondents respectfully answer and argue "No".

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STATEMENT OF THE CASE

This case was initially instituted in the United States District Court for the Western District of Kentucky under 42 U.S.C. Section 1983 by the Petitioner, Galen Nelson, a former Jefferson County, Kentucky police officer, alleging unconstitutional treatment in connection with a Departmental disciplinary investigation. Petitioner had received two short suspensions and was subsequently discharged for further misconduct after suit was filed. He then amended his Complaint to allege Fifth Amendment deprivations in connection with the dismissal, as well as asserting various pendent Kentucky state law claims.

Petitioner seeks reinstatement, back pay, and damages from the municipal Respondent, Jefferson County, Kentucky, and also damages from various individual Respondents who were elected and appointed officials affiliated at the time with Jefferson County, Kentucky and its Police Department.[1]

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[1] Respondent Addison Mitchell ["Mitch"] McConnell was then the elected Jefferson County Judge Executive, the County's chief executive officer, and is now a United States Senator. Respondents' Edgar G. Helm, Jr. and Kenneth Graham, both now retired, were respectively the Police Department's Chief and Associate Chief. Respondents Topp, Lampe, and Fuchs are all presently commanding officers with the Department, and were at the time members of the Department's Professional Standards Unit, charged with the responsibility of investigating complaints and charges of misconduct against Department officers. During part of the relevant time period, Respondent Topp was also Petitioner's District Commander. Respondent Whalin, now a top Department Commander was, at the time, a lieutenant assigned to the Department's Criminal Investigation Division.

The events which led ultimately to Petitioner's dismissal from the Department unfolded as follows:

By Memorandum dated June 24, 1982 to Respondent Helm, who was at the time Chief of the Jefferson County Police Department [the "Department"] Petitioner requested replacement of two uniform items - a pair of shoes and pants - which he claimed had been damaged in the line of duty.

Respondent Helm routinely approved this request, but noted the last sentence in Petitioner's memorandum to the effect that " . . . [the loss of the uniform items] can be attributed to a Radio Room fowl-up (sic)". The Chief referred the matter to the Department's Administrative Services Division for a report as to any dereliction on the part of Department Radio Room personnel.

During the course of this inquiry - which was initiated by Petitioner's statement - serious questions arose as to whether Petitioner's uniform items were in fact damaged as he had claimed.

Petitioner was then given a direct order to submit a detailed written statement as to the specifics of how his uniform came to be damaged. Petitioner refused in writing to do so, a direct violation of Department regulations, for which he was suspended by Respondent Helm for two days on July 14, 1982.

Further Departmental inquiry continued as to the underlying validity of Petitioner's claim. At the conclusion of this investigation, it was determined that the uniform items for which Petitioner claimed reimbursement (a) were unserviceable *prior to* the claimed date of

damage, and (b) were *not* damaged in the manner asserted in Petitioner's written claim.

Two other significant and persistent aspects of the overall case emerged at this point.

The first was Petitioner's sarcastic, provocative attitude toward the Department and its supervisors;[2] the second was the strident, undifferentiated claims by Petitioner and his counsel that, in every respect and detail, Petitioner's constitutional rights were being violated by the Department's inquiries.

By letter dated August 26, 1982, Respondent Helm imposed an additional two-day suspension on Petitioner for attempting to effect replacement, at Department expense, of already unserviceable uniform items.

The second suspension letter was handed to Petitioner at his regular shift roll call August 26, 1982, and triggered an outburst by Petitioner which included an unambiguous threat on Respondent Helm's life.

This latter incident was witnessed by Petitioner's immediate supervisor who reported the matter in writing to Petitioner's District Commander, the Respondent Charles Topp. That report included other concerns the supervisor had about a serious pattern of aberrant behavior on Petitioner's part, which had developed over a significant period of time.

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[2] In an official Departmental interview August 9, 1982, Petitioner bragged that the uniform items for which he claimed reimbursement were unserviceable prior to the filing of his claim.

Respondent Topp immediately communicated the report to the Respondent Helm. Based on the report, as well as Petitioner's unusual, even bizarre conduct in connection with the damaged uniform claim, Chief Helm suspended Petitioner with pay, directed him to report for a psychological evaluation, and commenced a further investigation into the conduct related in the supervisor's written report.

The subsequent investigation confirmed Petitioner's erratic performance and his aggressively hostile attitudes toward fellow officers and selected members of the public.

The investigation also turned up evidence that Petitioner had held himself out to a number of officers as having connections with various foreign interests who had asked Petitioner to organize and provide men for some type of paramilitary operations or services in areas such as the Middle East. One officer who Petitioner "recruited" even went so far as to secure a passport and plan his resignation from the Department.

During the disciplinary investigation, Department investigators learned that another unrelated investigation into a break-in at a local department store during which a number of cameras were stolen, had linked Petitioner to a woman who was suspected of knowingly receiving the stolen cameras.

Further investigation into this matter conclusively established that Petitioner not only had possession of cameras stolen in that robbery, he had assisted the suspect in destroying them to avoid detection.

Based on this evidence, search warrants were obtained by Department investigators to search Petitioner's residence and personal vehicle for evidence of the stolen cameras. None was found, but officers did discover illicit drug paraphernalia in Petitioner's vehicle.

Based on all this conduct, and pursuant to explicit statutory authority under Kentucky state law, Respondent Helm dismissed Petitioner from the Department by letter dated September 28, 1982. Petitioner then took an appeal from Respondent Helm's action to the Jefferson County, Kentucky Police Merit Board [the "Merit Board"].[3]

Petitioner's formal letter appealing his dismissal asserted, *inter alia* the explicit factual allegation that Respondent Helm's dismissal of Petitioner was " . . . a retaliatory act for Petitioner's having filed suit in federal court on September 24, 1982; . . . "[4]

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[3] Under the Kentucky state law, The Merit Board administers the classified merit service from which Petitioner was dismissed. The Board also serves as the statutory reviewing authority over disciplinary appeals. The Merit Board was initially a party to the § 1983 Complaint filed in the U. S. District Court but was subsequently dismissed by agreement.

[4] Petitioner's appeal letter, dated September 23, 1982 is reprinted in the Appendix to this Brief at p.1a. The reference in the letter to "Rule 10.1(2) of the Jefferson County, Kentucky Police Merit Board" refers to the Board Rule governing disciplinary appeals. Board Hearing Rule 3.1(2), in effect at the time, required an appellant officer to file a " . . . statement of the grounds [for the appeal] . . . " with the notice of appeal, or by separate pleading or notice within five days after the filing of the initial notice. Counsel's letter also serves as compliance with this latter Rule.

The appeal to the Merit Board was stayed for over a year at Petitioner's counsel's request, and was finally brought on for a series of hearings beginning in March 1984 on various constitutional challenges Petitioner raised as to the proceedings and the underlying investigation.[5]

A full evidentiary hearing on the merits of the specific charges against the Petitioner was held before the Merit Board August 29 and 30, 1984 with four of six members present. Following this hearing, the Merit Board sustained the Respondent Helm's action dismissing Petitioner by a vote of 2-2. The Board disagreed only on the degree of punishment, whether Petitioner should be fired or given a long suspension.[6]

On April 18, 1985, Petitioner filed a statutory appeal from the Merit Board ruling with the Jefferson County, Kentucky Circuit Court.[7] No further action was taken in this case for nearly a year.

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[5] The various Findings and Orders of the Merit Board in connection with the administrative appeal are reprinted in the Appendix to the Petition, pp. 9a-21a.

[6] The governing state statute requires a majority vote to *overturn* the Chief's disciplinary action. Tie votes thus result in any given action being sustained. The Merit Board Members who heard the case were essentially agreed as to Nelson's culpability on all but one of the stated charges, disagreeing only as to the degree of punishment appropriate in the case; see Merit Board Findings and Order entered March 20, 1985; Appendix to the Petition, pp 15a-21a.

[7] The Circuit Court of each Kentucky County is the first level Court of general jurisdiction under Kentucky's unified

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In the pending U. S. District Court § 1983 case, early in 1986, Petitioner filed a motion for leave to amend his complaint. The motion was sustained February 5, 1986.

Among other matters Petitioner's amended complaint clearly and unambiguously, for the first time, asserted claims against the Respondent public officials in their respective *individual* as opposed to *official* capacities.

The Respondents moved for summary judgment asserting, in part, immunity of the Respondents in their individual capacities pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). On April 4, 1986, the District Court denied the Motion[8] and the Respondent public officials took an immediate interlocutory appeal to the United States Court of Appeals for the Sixth Circuit under the authority of *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[9]

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state court system. The Circuit Court is also designated by Kentucky state law as the Court to which appeals of Merit Board orders may be taken by any aggrieved party, *Duvall v. Helm*, Ky. App., 623 S.W.2d 234 (1981). Review is limited to familiar and virtually universal "arbitrariness" standards; see *Brady v. Pettit, Mayor*, Ky., 586 S.W.2d 29 (1979) and *Crouch v. Jefferson County, Kentucky Police Merit Board*, Supreme Court of Kentucky, No. 86-SC-521-DG ___ S.W.2d ___ (9/8/88, as modified 6/8/89)

[8] See Memorandum and Order of the District Court entered April 4, 1986, reprinted at the Appendix to the Petition, pp 22a-23a.

[9] The Court of Appeals affirmed the District Court on this appeal in an unpublished Opinion, and a subsequent Order denying a Petition for rehearing, effective July 28, 1986, reprinted in the Appendix to the Petition pp 53a-57a; see also *post* p. 10 this Brief.

At or about this time, after a year of inactivity in the parallel Jefferson Circuit Court case involving Petitioner's appeal from the Merit Board, the Respondent Helm filed a motion to compel Petitioner to go forward with the case or suffer dismissal. In the face of this Motion, Petitioner filed a cross-motion for voluntary dismissal pursuant to Rule 41.01, Kentucky Rules of Civil Procedure, specifically asking for a "without prejudice" dismissal. The Respondent Helm objected to this type of dismissal, and on July 1, 1986, the Circuit Court entered an Order dismissing the action.[10]

The Respondents then renewed their motion to dismiss Petitioner's complaint in the District Court asserting, *inter alia*, that the "with prejudice" character of the July 1, 1986 Order of dismissal in the Circuit Court precluded further litigation in the Federal forum in accordance with the settled precedent of *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984).

Petitioner's Response to Respondent's renewed motion surfaced for the first time another "Order" entered in the Jefferson Circuit Court case on July 14, 1986, providing that the case was now dismissed "without prejudice".[11] In his response to the Respondents'

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[10] The July 1, 1986 Jefferson Circuit Court Order was silent as to whether the dismissal was with or without prejudice and thus, under the operation of CR 41.01(2) - the exact counterpart of FRCivP 41(a)(2) - the dismissal was deemed to be "with prejudice".

[11] Both the original July 1 and the "revised" July 14 Circuit Court Orders are reprinted in the Appendix to the Petition at pp 43a-44a. Respondents' counsel neither received notice of the

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renewed motion in the District Court, Petitioner now argued that *this* type of Order had no preclusive effect on Petitioner's case pending in the District Court.[12]

This unusual and controversial development notwithstanding, the District Court nevertheless entered a Memorandum and Order on April 13, 1987 which held that the Federal case was indeed subject to dismissal on preclusion grounds. That Order reserved final dismissal in the District Court, however, by reason of the interlocutory appeal pending at the time in the U. S. Sixth Circuit Court of Appeals.[13]

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filing or pendency before the Court of the July 14 Order, nor its entry by the Court. Because so much time had elapsed, counsel had virtually no remedy in the state court by reason of Kentucky Civil Rule 77.04(a) which like FRCivP 77(d), provides that lack of notice of entry does not affect the validity of a judgment. Respondent's counsel did, however, extensively document these circumstances in their Reply Memorandum filed in the District Court together with their authenticated conclusion that they had been purposefully "blindsided" by the Petitioner's *ex parte* tactics.

[12] Petitioner has reprinted, in full, his response to Respondents' renewed motion in the Appendix to the Petition at pp 24a-42a.

[13] The Memorandum and Order entered April 13, 1987 in the District Court, provisionally granting Respondents' motion and dismissing Petitioner's complaint *in toto* is reprinted in the Appendix to the Petition at pp 48a-52a.

On July 28, 1987, the Court of Appeals affirmed the District Court on the Respondents' interlocutory appeal.[14]

Following the remand from the Court of Appeals and upon full reconsideration, on September 14, 1987, the District Court entered its final Order, restating its earlier April 13, 1987 Order granting the Respondents' motion and dismissing the Petitioner's amended complaint.[15]

The Petitioner then appealed the District Court dismissal back to the U. S. Court of Appeals for the Sixth Circuit which affirmed the District Court in a published opinion issued December 12, 1988.[16] Petitioner then filed his Petition for a Writ of Certiorari with this Court where it was docketed June 12, 1989.[17]

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[14] See p. 7, *ante*, this Brief. The unpublished opinion of the Court of Appeals is reprinted in the Appendix to the Petition at pp 53a-57a.

[15] The District Court's September 14, 1987 Memorandum and Order is reprinted in the Appendix to the Petition at pp 58a-59a.

[16] Reprinted in the Appendix to the Petitioner at pp 60a-64a. Petitioner also reprints the Court of Appeals Order filed March 14, 1989 denying his petition for rehearing en banc [p. 65a]. For some reason, Petitioner failed to include the unpublished dissent of Judge Harry Wellford, who was not a member of the original panel, but who would have granted the petition for rehearing. The Court of Appeals Order filed March 14, 1989, including Judge Wellford's dissent, is reprinted at p. 3a of the Appendix to Respondents' Brief.

[17] The Petition [p.2] asserts jurisdiction under "28 United State Code Section 1257(3)", a statute which was amended and renumbered June 27, 1988, and is in any case inapplicable to

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Respondents received their service copy of the Petition by regular mail on June 13, 1989.

ARGUMENT: WHY THE PETITION SHOULD BE DENIED

Petitioner's arguments for granting the Writ can be categorized as follows:

First, Petitioner argues that the Court of Appeals, as a matter of *federal* law and procedure, incorrectly applied principles of preclusion articulated by this Court;

Second, Petitioner claims the Court of Appeals incorrectly apprehended and applied Kentucky *state* law insofar as the same essentially supplies the foundation for the kind of preclusion analysis applicable to this case; and

Third, Petitioner claims that the sum total of the *result* achieved in the course of his fitful odyssey though various state and federal *fora* is unfair and inequitable.

None of these arguments, nor the authorities advanced by Petitioner in support therefor, constitute the kind of " . . . special and important reasons, . . . " warranting review of this case; *Rule 17.1, Rules of the Supreme Court of the United States.*

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cases in the Court of Appeals. Jurisdiction of this Court to review the Judgment of the Sixth Circuit Court of Appeals in this case is grounded, if at all, in Title 28, United States Code, Section 1254(1). This is apparently not an error fatal to the Petition; see e.g. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1978); *compare Haner v. United States*, 440 U.S. 1308, 1310(note) (1979).

At the threshold, the Court will not normally - as urged by Petitioner in this case - grant the Writ simply to review the lower court's treatment of evidence or specific facts, *United States v. Johnston*, 268 U.S. 220 (1925).

Likewise, where a particular controversy turns on an application of state law, its resolution by the lower federal courts will not be set aside except upon a showing of palpable and pernicious error - notably absent in this case, *In re Woods*, 143 U.S. 202 (1892); *Palmer v. Hoffman*, 318 U. S. 109, 118 (1943) *reh. den.* 318 U. S. 800 (1943); *Steele v. General Motors, Inc.*, 329 U.S. 433, 438-439 (1947), *reh. den.* 329 U.S. 834 (1947).

The District Court had before it not only the various findings and orders of the Merit Board, but the complete record of the Board's deliberations, including transcripts of the numerous hearings the Board held, both on the procedural and constitutional challenges Petitioner raised, and the substantive merits of Respondent Helm's charges against him.[18]

The Court of Appeals *also* had this record, *as well as* the District Court's specific findings and rulings, in reaching its opinion affirming the District Court.

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[18] The District Court also had in its record all the proceedings, however sparse, from the Jefferson Circuit Court action. The District Court ruled, and the Court of Appeals affirmed, that irrespective of the disposition of Petitioner's State Court Appeal from the Merit Board Findings, those Findings, standing alone, whether deemed "reviewed" or "unreviewed" by the Circuit Court, precluded further litigation of the same issues in the Federal forum.

The sufficiency, the logic, and the careful analyses reflected in these opinions is apparent, and will not be reargued here.[19]

Fundamentally, Petitioner's arguments rest on his characterization of the Merit Board as a " . . . low grade administrative agency . . . " without standing or authority to render any kind of preclusive adjudication, under Kentucky law or otherwise; Petition p. 19 and *passim*.[20]

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[19] Both the District Court, and the Court of Appeals found a substantial, if not complete identity of claims and issues raised before the Board, and in the federal court. This circumstance is amply supported by an examination of Petitioner's amended complaint, and the various Merit Board findings and orders [Appendix to Petition, pp 1a-9a, and 15a-21a.

[20] The dissent to the Court of Appeals order denying rehearing and rehearing en banc, facially, appears to brace Petitioner's arguments on this point. With all respect to Judge Wellford, an able and distinguished jurist, his attempted distinction between agency "factfinding" on the one hand, and its rendering of an "opinion" on the other, simply escapes comprehension. Further, an opinion of the Kentucky Court of Appeals cited in the dissent for the proposition that Kentucky administrative bodies are without authority to consider constitutional issues, has been stricken and is without any precedental utility whatsoever, generally or in this matter. The specific Court of Appeals opinion, *Lexington Herald-Leader Co. v. Revenue Cabinet* No. 86-CA-2196, was in fact rendered April 29, 1988, as an opinion "to be published". However, on August 30, 1988, the Supreme Court of Kentucky filed an Order granting review and directing the Court of Appeals opinion *not* to be published, No. 88-SC 364. On January 19, 1989 - two months before the dissent was filed - the Kentucky Supreme Court entered another Order, apparently by agreement, reversing the Court of Appeals Opinion, and dismissing the case in the

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There is simply no question that the general rule in Kentucky is, and has long been that quasi-judicial acts of public commissions and administrative boards such as the Jefferson County Police Merit Board, acting within their respective jurisdiction(s), are given the same preclusive effect as judgments of Courts having general judicial powers; see *Happy Coal Co. v. Hartbarger*, Ky., 65 S.W.2d 977 (1933).[21]

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Supreme Court. Rule 76.28(4)(c), Kentucky Rules of Civil Procedure, provides that unpublished opinions of Kentucky Appellate Courts " . . . shall not be cited or used as authority in any other case . . . "

[21] The Petitioner offers *Weaver v. Anderson County Fiscal Court* [D.C. Ky., 1986], 648 F.Supp. 1575, as standing for the proposition that acts of Kentucky administrative agencies are not really accorded the same preclusive effect as judicial decisions, citing *Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, Ky., 602 S.W.2d 427 (1980). *Weaver* has been reversed without opinion, 838 F.2d 1216 [6th Cir. 2-11-88]. That circumstance notwithstanding, Petitioner's recitation of this case misses the mark. *Weaver* held that, under *Ludlow*, preclusive effect given to decisions of *one particular kind* of Kentucky administrative agency, a Board of Adjustment and Zoning Appeals, was " . . . more limited under Kentucky law than that given to those of other agencies" [648 F.Supp. 1579]. The decision held that specific findings of *that board*, although nominally entitled to preclusive effect, would not be accorded such because of the peculiar nature of the specific agency under Kentucky law as reflected in the *Ludlow* case. The administrative agency at issue in this case, the Jefferson County, Kentucky Police Merit Board is clearly not within the narrow exception *Ludlow* prys out of the general rule. Further, an unpublished opinion of the Court of Appeals filed August 18, 1987, *Young v. McDaniel*, No. 86-6268 [included in the Appendix to this Brief, pp 8a-9a] explicitly recognized the authority of the *same agency* to hear and adjudicate a First Amendment constitutional issue, and gave preclusive effect to the agency's disposition.

As the Court of Appeals opinion points out, Kentucky law in this regard is in keeping with quite familiar principles of claim or issue preclusion generally applicable in most jurisdictions.[22]

Both the District Court and the Court of Appeals correctly applied this aspect of preclusion analysis to the fundamental principles enunciated by this Court in *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

Finally, the Respondents take particular issue with Petitioner's repeated assertions that he has been shortchanged or dealt with unfairly by the multiple administrative and judicial processes he has invoked. By any standard, the Petitioner has been accorded exhaustive consideration and review of his claims and arguments, and in every respect a full measure of justice.[23]

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[22] *Nelson v. Jefferson County*, supra, 863 F.2d at 18; Appendix to the Petition, p. 62a

[23] Petitioner's claims of "inequitable" treatment at the hands of the Courts suggest that the principles of fairness Petitioner argues run in only one direction. Respondents' answer this with a quote from one of the most prominent and highly respected jurists in Kentucky, or for that matter in the nation, former Kentucky Supreme Court Chief Justice John Palmore, writing in *Alexander Hamilton Life Insurance Company of America v. Lewis*, Ky., 550 S.W.2d 558 (1977):

> " 'Equity' is a broad term, allowing for as many different definitions as there are people who are familiar with it. Often overlooked, however, is the simple fact that both equity and equality are derived from the same word and

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Without complaint or rancor, the Respondents respectfully state and argue to this Court that it is time to end this litigation, at this point, by denying the Petition for Writ of Certiorari.

Neither the opinion of the District Court, nor the opinion of the Court of Appeals, nor the Petition for Writ of Certiorari pending before this Court, nor the extensive record in this case, reflect any reason for granting the Writ under this Court's own Rule 17.1.

CONCLUSION

For all the reasons, and upon the authorities cited and argued in this, their Brief in Opposition to the

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have much more in common than a similar sound. We think of equity as an implement of sympathy and compassion, but its real meaning is more akin to equality. What is fair for one must be fair for the other."

550 S.W.2d at 560.

Petition for Writ of Certiorari, the Respondents respectfully urge that the Petition ought to be denied.

July 13, 1989

Respectfully submitted,

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APPENDIX

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September 28, 1982

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EDWARD F. HARRINGTON, JR.
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Certified Mail Number P 353 458 794

Jefferson County Police Merit Board
208 South Fifth Street, Suite 606
Louisville, Kentucky 40202

Attention: Ms. Jeanette Priebe, Acting Secretary

Re: Termination of Galen Nelson

Dear Ms. Priebe:

Pursuant to Rule 10.1(2) of the Jefferson County Police Merit Board on behalf of the referenced officer, we move as follows:

A. To dismiss the termination order of September 28, 1982 on the grounds of improper service, i.e., the officer has *not* been served and is presently a patient at Our Lady of Peace Hospital as the direct result of Chief Helm's and this department's harassment; that it is a retaliatory act for Officer Nelson's having filed suit in federal court on September 24, 1982; that it is violative of Officer Nelson's rights under the 5th and 14th Amendments to the United States Constitution; and that this Board is without jurisdiction herein due to Officer Nelson pending injunctive relief

hearing involving this Board which is set for October 13, 1982.

B. We appeal Chief Helm's decision to terminate Officer Nelson as being arbitrary, capricious and retaliatory in nature without any basis in law and/or fact. Additionally, his actions violated Officer Nelson's constitutional rights as guaranteed under the 1st, 3rd, 4th, 5th, 6th, 8th, and 14th Amendments and are without truth. There never were or have been violations of *any* of the Jefferson County Police Department Standard Operating Procedures except by officers of the department to include Cpt. Topp, Lt. Whelan and Sgts. Fuchs and Lampe.

We move for an immediate meeting with the Board to schedule subpoena and other discovery devices.

Very truly yours,

RADOLOVICH, HARRINGTON & LEVY, P.S.C.

/s/ F. R. Radolovich

NO. 87-6070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GALEN NELSON, Plaintiff-Appellant, v. JEFFERSON COUNTY, KENTUCKY, ET AL., Defendants-Appellees	)	ORDER (Filed Mar. 14, 1989)

BEFORE: ENGEL, Chief Judge; BOGGS, Circuit Judges; and McRAE*, Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

---

* Hon. Robert M. McRae, Jr. sitting by designation from the Western District of Tennessee

WELLFORD, Circuit Judge, **dissenting** from the denial to rehear en banc:

The court should have heard this case *en banc* because it involves an important issue that frequently confronts our court and federal district courts in this circuit. The question is whether the split decision of a civilian County Merit Board, which reviews police department decisions, on a federal constitutional violation claim has preclusive effect so that the outcome of a *pending* constitutional claim in federal court is controlled by that decision.

Petitioner Galen Nelson brought a civil action under 42 U.S.C. § 1983 against the Jefferson County, Kentucky Police Department and its officials alleging that the police department violated his federal constitutional rights during a departmental investigation that ultimately lead to his discharge. While the petitioner was serving as a county police officer, a departmental investigation was conducted to determine whether he had engaged in improper conduct. It was during the course of this investigation that Nelson filed suit in federal court alleging that the investigators had illegally searched his home and automobile in violation of the constitution. Four days after filing suit in federal court, Nelson was discharged. He then amended his complaint to include the discharge as a separate constitutional violation.

Nelson sought a review of his discharge by the County Merit Board. After a full evidentiary hearing, the Board by a split decision upheld the discharge and denied that any constitutional infractions had taken place.

The panel's decision relies on *University of Tennessee v. Elliot*, ___ U.S. ___, 106 S. Ct. 3220 (1986), which held only that "federal courts give preclusive effect to the factfinding of state administrative tribunals." *Id.* at 3226. It says nothing about *opinions* of state agencies on substantial federal constitutional issues. A seriously divided Supreme Court in *Elliot* was willing to give preclusive effect only to state agency *factfinding*, and held at the same time that such agency decisions were not entitled to such effect in Title VII proceedings. *Elliot*, then, is not authority for the decision in the instant case. *See also Perry v. Brakke*, 826 F.2d 740, 746 (8th Cir. 1987); *Weaver v. Anderson County Fiscal Court*, 648 F. Supp. 1575 (E.D. Ky. 1986).

Even assuming that *Tennessee v. Elliot* applies to previously litigated constitutional issues, the panel has not shown that each of the requisite conditions for the applicability of *Elliot* were met. As the panel acknowledges, *Elliot* gives preclusive effect to state administrative findings only if such findings would have preclusive effect under state law. The panel of this court which rendered the opinion in question cited *Barnes v. McDowell*, 647 F. Supp. 1307, 1311 (E.D. Ky), but that decision was changed in 661 F. Supp. 498 (1987). That case does not address the authority of a civilian review board to render final judgments on federal constitutional issues. Nelson, on the other hand, relies on a more directly applicable Kentucky decision that clearly answers this question in the negative. In *Lexington Herald-Leader Co. v. Revenue Cabinet*, No. 86-CA-2196-MR (Ky. Ct. of App. April 29, 1988), the court held that state law could not be interpreted to "relegate matters of *constitutional proportions* to the Tax Board for

resolution, nor could it without offending Section 28 of our Constitution . . . certainly a non-judicial body such as the Tax Board does not have the competence to deal with [constitutional] issues like those raised . . . " (emphasis added).

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988), involved the bringing of a § 1983 action by a discharged employee in federal court after the rendering of a state agency decision and its affirmance on the merits by the Kentucky appellate courts. With respect to the constitutional claim made by Barnes, the court pointed out that "[w]hether the defendants' motivation for the discharge was unconstitutional simply was not an issue in the state judicial proceedings." *Id.* at 731. *Barnes* referred, in this respect, to *Wicker v. Board of Education*, 826 F.2d 442 (6th Cir. 1987), a case which fully supports the petitioner's position. *Wicker* held that a litigant who filed suit in federal court before the rendering of a state administrative decision retains the right to litigate his federal claims in federal court. *Id.* at 451. Nelson, of course, filed his lawsuit in federal court before *any* action was taken by the County Merit Board.

It is doubtful that the County Board in this case rendered an effectual decision on the constitutional issue. The Board stated that it was rejecting Nelson's constitutional claim, but gave no reasoned basis for a legal conclusion. Nothing in the record indicates that the Board had the power to act on the petitioner's constitutional claims of unlawful search and seizure. There is no indication, moreover, that a single member of the Jefferson County Merit Board had any legal training or experience.

For these reasons, I would have granted the petition for rehearing *en banc*, and I dissent from the court's refusal to consider the case *en banc*.

NO. 86-6268

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEX F. YOUNG, Plaintiff-Appellant, v. RUSSELL S. McDANIEL, BREMER EHRLER, JEFFERSON COUNTY FISCAL COURT, JEFFERSON COUNTY POLICE MERIT BOARD, and UNKNOWN DEFENDANTS, Defendants-Appellees	)	*ORDER* (Filed Aug. 18, 1987) [NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

BEFORE: KEITH and NORRIS, Circuit Judges; and GIBBONS, District Judge.*

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiff, a former member of the Ku Klux Klan, was terminated from the Jefferson County, Kentucky, Police Department for, among other things, distributing "hate" literature abusive to black and Jewish persons to individuals who knew plaintiff as a police officer. Plaintiff appealed his termination to the Jefferson County Police Merit Board and raised a first amendment issue. A full

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* The Honorable Julia Gibbons, U.S. District Judge for the Western District of Tennessee, sitting by designation.

due process hearing was held and his termination was affirmed. Plaintiff then filed a complaint with the Jefferson Circuit Court alleging violations of the first and fourteenth amendments. The record indicates that, upon plaintiff's own motion, the circuit court later dismissed plaintiff's action with prejudice, which is a judgment on the merits for purposes of res judicata. *See Polk v. Wimsatt*, 689 S.W.2d 363, 364 (Ky. Ct. App. 1985). On that same day plaintiff filed his complaint in the district court alleging violations of the first and fourteenth amendments and adding two new defendants. The district court dismissed plaintiff's action, upon defendants' motion, and plaintiff appealed.

Pursuant to the doctrines of res judicata and collateral estoppel and 28 U.S.C. § 1738, as set forth in the district court opinion, we hereby affirm. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: 9/10/87

COST: none